Charles S. Wilson Memorial Hospital (Division of U.H.S. Hospitals, Inc.) *and* International Brotherhood of Painters and Allied Trades, Maintenance and Service Local 1990, AFL–CIO. Case 3–CA–20667

August 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On June 24, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order, as modified and set forth in full below.

We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening to rescind existing benefits pertaining to paid time off if the Union filed unfair labor practice charges.[2] We also adopt the judge's finding that the Respondent further violated Section 8(a)(1) by maintaining a rule requiring employees to refrain from talking to union representatives and requiring them to inform management of any conversations with union representatives.[3] However, we reverse the judge's dismissal of allegations that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish employees' timecards to the Union as requested and further violated Section 8(a)(5) and (1) by unilaterally modifying contractual shift differential pay entitlements.

1. On January 24, 1997, Union Representative Finch made a written request to see his own employee timecards for the pay periods of February 4 to 17, 1996, March 3 to 16, 1996, and December 8 to 21, 1996. The Respondent furnished the December timecards but refused to permit access to the other requested timecards. The reason given was that the governing collective-bargaining agreement required that a grievance must be filed within 7 days of the occurrence giving rise to the grievance and that, therefore, no grievance could be filed over any irregularities revealed by the timecards. The judge found that the Respondent was privileged to decline furnishing the timecards because the information was not relevant to the enforcement of the collective-bargaining agreement. We disagree.

It is well settled that attendance records and employee timecards are presumptively relevant to a union's duties as the exclusive bargaining representative of unit employees. *Zeta Consumer Products Corp.*, 326 NLRB 293 (1998). Further, in the present case, the timecards that the Union sought concerned shift differential payment issues, a matter that, as the judge found, had been for some time "fertile ground for confusion and contention." Thus, whether or not a viable grievance procedurally could have been filed and processed concerning the precise dates covered by the requested Finch timecards, the information sought by the Union was particularly relevant to its responsibilities over these ongoing payment issues, including potential future problems or contemplated approaches to avoiding appropriate wage payment problems. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the timecards sought by the Union.

2. The complaint also alleges that the Respondent unilaterally and without notice to the Union revised contractual shift differential pay entitlements in violation of Section 8(a)(5) and (1). The judge found that the dispute over this matter was essentially a dispute concerning the interpretation of the collective-bargaining agreement in which the positions of both the Union and the Respondent were reasonable and plausible. Accordingly, the judge dismissed this allegation of the complaint, citing *NCR Corp*., 271 NLRB 1212 (1984); and *Westinghouse Electric Corp*., 313 NLRB 452 (1993), enfd. sub nom. *Salaried Employees Assn. of Baltimore Div. v. NLRB*, 46 F.3d 1126 (4th Cir. 1995), cert. denied 514 U.S. 1037 (1995). We reverse.

Article VI, section 3 of the collective-bargaining agreement provides as follows:

> *Shift Differential*: Employees shall be paid a shift differential of $.90 per hour in accordance with the Hospital's Human Resources Policy 3.7 *Shift Differential*.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding in this respect, we note that the judge found that the Respondent linked the recission of these benefits to the filing of a charge. Thus, union official, William A. Finch, testified that Michael McNally, the Respondent's vice president for human resources, told him that the Respondent would rescind benefits should the Union file unfair labor practice charges with the Board. In these circumstances, we find that McNally's comments amounted to a threat to rescind benefits that was linked specifically to the filing of charges. The comments were not made simply to illustrate the Respondent's interpretation of the relevant contractual provisions.

[3] In finding this violation, we rely on sec. 5.5.4 of the Respondent's Human Resources Policy and Procedure Manual pertaining to "direct contact by Organizers." As found by the judge, this provision can reasonably be construed on its face as requiring employees to refrain from conversing with union representatives and to report conversations with union representatives. In these circumstances, we find it unnecessary to consider whether or not sec. 5.5.3 of the Manual pertaining to "Supervisors' Awareness" violates the Act in any respect.

Section 3.7 is a provision contained in the Respondent's Human Resources Policy and Procedure Manual, a document containing numerous employment rules and regulations applicable to both nonunion and union-represented employees of the Respondent. Included in section 3.7 are general eligibility requirements and guidelines for determining the circumstances in which employees will be paid a shift differential premium.

On April 11, 1997, the Respondent announced the modification of shift differential eligibility rules by changing eligibility requirements set forth in section 3.7 of the manual. It did so without notifying or bargaining with the Union. When the Union protested the modifications, the Respondent asserted that the Union had effectively agreed to allow the Respondent to modify section 3.7 because that section had been expressly incorporated into the collective-bargaining agreement. The Respondent contends, in this regard, that section 1.1 of the manual specifically provides that changes in policies and procedures contained therein will be issued as needed, and that the parties' contractual management-rights provision reserves to the Respondent the right to make or change rules, regulations, and practices not inconsistent with the terms of the collective-bargaining agreement.

Waivers of statutory rights "are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Georgia Power Co*., 325 NLRB 420 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). "[E]ither the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the Union consciously yielded or clearly and unmistakably waived its interest in the matter." *Georgia Power Co*., 325 NLRB at 420–421.

We find that the reference in the collective-bargaining agreement to section 3.7 of the manual clearly established that the parties agreed that the eligibility requirements set forth therein would govern the payment of shift differential premiums. However, the bargaining agreement does not contain any language conferring on the Respondent the right unilaterally to change the eligibility requirements of section 3.7 as they existed at the time the contract was executed. Further, the contractual management-rights provision only confers on the Respondent the right to change rules and regulations "not inconsistent with the terms of this Agreement."

In these circumstances, we find that the contractual language does not meet the standard for a clear and unmistakable waiver of the Union's right to bargain about any changes in the eligibility requirements for shift differential pay and, indeed, of the Union's right to insist that the Respondent honor the eligibility requirements contained in section 3.7 at the time of the contract's execution.[4] Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing shift differential entitlements.[5]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to furnish to the Union the timecard information requested on or about January 24, 1997. We shall also order the Respondent to restore its former policy pertaining to shift differential entitlements under article VI, section 3 of the collective-bargaining agreement. In addition, the Respondent shall reimburse unit employees for any losses resulting from the unilateral changes, with such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Charles S. Wilson Memorial Hospital, Johnson City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in force and effect a rule requiring employees to refrain from talking to union representatives and requiring them to report conversations with union representatives to management.

(b) Threatening employees that if the International Brotherhood of Painters and Allied Trades, Maintenance and Service Local 1990, AFL–CIO, filed an unfair labor

[4] The Respondent contends that, during contract negotiations, its negotiator told the Union that the Respondent reserved the right to change the policies contained in sec. 3.7, a matter denied at the hearing by the Union's representatives. Even assuming, arguendo, that the Respondent sought to reserve the right to make changes, there is no showing that the Union agreed to that assertion or consciously yielded or clearly waived its interests. Thus, the notes of the Respondent's negotiator, McNally, only indicate that the Union accepted the contractual language as proposed and did not expressly respond to, much less agree to, the Respondent's assertion of a right to change the eligibility policies in the future.

[5] We adopt the judge's dismissal of the complaint allegation that the Respondent violated the Act by eliminating the "pay plus" portion of the contractual bonus plan. In contrast to the allegation concerning unilateral changes in the shift eligibility rules—which turns on whether the Union waived its right to bargain or to be consulted about future changes—the "pay plus" allegation turns solely on the interpretation of the term "bonus program" under the bargaining agreement, as applied to a newly enacted payment system, and raises no issue of waiver. We agree with the judge that both parties offer plausible interpretations of that term, and that the Respondent's actions in accordance with its interpretation, although arguably a violation of the contract, do not constitute a violation of its bargaining obligations under the Act.

practice charge, the Employer would withdraw certain benefits previously given to employees represented by said Union.

(c) Failing and refusing to furnish to the Union requested timecard information that is relevant and necessary to its role as the exclusive bargaining representative of bargaining unit employees.

(d) Unilaterally modifying its policy pertaining to shift differential entitlement under article VI, section 3 of the collective-bargaining agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the timecard information that it requested on around January 24, 1997.

(b) Restore the shift differential entitlement policies under article VI, section 3 of the collective-bargaining agreement that were changed unilaterally, and make unit employees whole, with interest, for any losses that they may have suffered as a result of the unilateral changes.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personal records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Johnson City, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain any rule requiring employees to refrain from talking to union representatives and/or requiring them to report conversations with union representatives to management.

WE WILL NOT threaten employees that if the International Brotherhood of Painters and Allied Trades, Maintenance and Service Local 1990, AFL–CIO, filed an unfair labor practice charge against us, we would withdraw benefits previously given to employees represented by said Union.

WE WILL NOT fail and refuse to furnish to the Union requested timecard information that is relevant and necessary to its role as the exclusive bargaining representative of bargaining unit employees.

WE WILL NOT unilaterally modify our policy pertaining to shift differential entitlement under article VI, section 3 of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union the timecard information requested on around January 24, 1997.

WE WILL restore the shift differential entitlement policy under article VI, section 3 of the collective-bargaining agreement and WE WILL make unit employees whole, with interest, for any losses that they may have suffered as a result of our unilateral changes.

Robert A. Ellison Esq., for the General Counsel.
John Fish, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Binghamton, New York, on February 23 and 24, 1998. The charge and amended charge were filed by the

Union on May 1, and July 7, 1997. The complaint was issued on July 11, 1997, and alleged:

1. That the Union has been the designated exclusive collective-bargaining representative of certain engineering department employees of the Respondent and that the most recent collective-bargaining agreement runs from February 1, 1996, to February 1, 1999.

2. That on or about April 16, 1997, the Respondent by Michael McNally, vice president of human resources, threatened employees with the recission of improved benefits if the Union filed unfair labor practice charges against it.

3. That since November 1, 1996, the Respondent has maintained a written policy directing employees to cease any conversation with union representatives and to report such conversations to the Respondent.

4. That on various dates since November 1, 1996, including January 28 and February 28, 1997, the Union requested that the Respondent furnish the time cards of unit employees which the Respondent has failed to furnish.

5. That on April 13, 1997, the Respondent unilaterally and without notice to the Union, revised the contractual shift differential pay entitlements and on June 22, 1997, eliminated the "pay plus" portion of the bonus plan set forth in the collective-bargaining agreement.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Charles S. Wilson Memorial Hospital, which is located in Johnson City, New York, is a division of U. H. S. Hospitals, Inc. Nearby is Binghamton General Hospital which is also a division of U. H. S. Hospitals, Inc. Wilson employs about 1800 and the two hospitals combined employ about 3000 people. The only group of people represented by a union are the 30 odd engineering department employees at Wilson.

The Union has been the bargaining representative of this group of employees since the early 1970s. According to both sides, the relationship has been amicable in the sense that the parties have, without resort to strikes or lockouts, entered into and lived by successive collective-bargaining agreements. According to Albert McNally, U.H.S. vice president for human resources, during the 9 years that he has been at the hospital, there have been only two grievances that went to arbitration. The most recent contract runs from February 1, 1996, to February 1, 1999.

Under the terms of the past and present collective-bargaining agreements, each classification of represented employee has a fixed pay rate. (Albeit a few classifications have a starting pay rate which is a little lower than the normal rate.) This is different from the other employees of the hospitals, including the engineering department employees at Binghamton Hospital, who have wage rate ranges, generally divided into quintiles.

The collective-bargaining agreement contains a grievance/arbitration provision, (art. X), as well as provisions relating to the finality of the contract, (art. XVIII) and management rights, (art. III). As certain provisions of the contract are at issue in the present case, these will be discussed at the appropriate time.

The terms and conditions of employment of nonrepresented employees are governed solely by the terms of the U.H.S. Human Resources Policy and Procedure Manual, (the manual). The policies set forth in this manual go back many years and the manual is amended, usually on a biyearly basis, as changes or modifications are made to policy. Copies of the manual are maintained in departmental managers' offices and are available for inspection by rank-and-file employees. (Employees are given, at the time of hire, an abbreviated version of the manual and they are notified that if they have any questions as to the application of policy, they can look at the manual.)

The employees who are represented by the Union are also subject to the terms of the Human Resources Policy and Procedure Manual, *except* as they may be inconsistent with the provisions of the collective-bargaining agreement. Thus, the contract's management-rights clause at article III states:

> All management functions and responsibilities which the Hospital has not expressly modified or necessary implied or restricted by a specific provision of this Agreement are retained and vested exclusively in the Hospital except as herein provided to the contrary. Without in any way limiting the foregoing, the Hospital reserves the right to establish and administer policies and procedures related to maintenance of the Hospital; to reprimand, suspend, discharge or otherwise discipline employees for just cause (except that during the probationary period the provision of Article 1, section 4 shall govern); to hire, transfer, promote layoff and recall employees to work; to determine the number of employees and the duties to be performed; to maintain the efficiency of employees and establish standards of performance; to establish, expand, reduce, alter, combine and consolidate all maintenance department operations, to determine the assignment of work, the qualifications required, the size and composition of the work force; to make or change Hospital rules, regulations, policies and practices not inconsistent with the terms of this Agreement; to contract out maintenance and/or construction work subject to the provisions of Article 1, Section 8; and otherwise to manage the Hospital, attain and maintain full operating efficiency and direct the work force except as expressly modified or restricted by a specific provision of this agreement.

On a very limited basis, the previous collective-bargaining agreement has specifically referred to provisions in the hospital's manual. In the 1994–1996 collective-bargaining agreement, the parties agreed that terminal benefits would be paid in accordance with the manual's policy, Section 4.1 and that leaves of absence for family leave purposes would be in accordance with section 4.8 of the manual. Thus, for those limited purposes the employer and the union agreed to describe the benefits as being the same as those given to all other employees in the hospitals.

The manual is a series of documents contained in a loose leaf book, which is updated on a regular basis. Article 1.1 of the manual states;

> Our practices policies and benefits are continually evaluated, and from time to time, UHS Hospitals may make changes.

> Changes in policies and procedures will be issued as needed, and it is the responsibility of policy manual holders to keep their manual current.
>
> . . . .
>
> All UHS Hospitals employees are expected to comply with the Personnel Policies and Procedures in this manual.

B. Section 5 of the Manual and Section 8(a)(1) of the Act.

Section 5 of the manual has been in the book, in its present form, since 1990. It states:

> 5.5.3 Supervisor's Awareness:
>
> In order to effectively respond to union organizing efforts, organizing activity must be reported as soon as it appears. Change in usual routine, presence of strangers and change in employee concerns and/or morals may be signs of union organizing activity. Supervisors are in the best position to notice such changes and it is each supervisor's responsibility to report them, whether among his/her own employees or anywhere throughout UHS, to the Manager, Employer/Employee Relations or the Vice President of Human Resources.
>
> 5.5.4. Direct contact by Organizers:
>
> If you are ever contacted by either an employee or an "outsider" who identifies himself/herself as an organizer, immediately:
>
> Tell him/her to contact the Vice President of Human Resources or the Manager Employment/Employee Relations.
>
> Terminate the conversation
>
> Contact the Vice President of Human Resources and report all circumstances of your conversation made a written confirmation of your conversation with the organizer and forward it to the Vice President of Human Resources.

The Respondent argues that this provision of the manual is directed only to supervisors and not to employees. It therefore argues that under *Twin County Grocers, Inc*., 244 NLRB 1028 (1979), it cannot be construed as being violative of the Act. However, as noted above, the manual is, by its terms, binding on all employees and this provision is not specifically reserved for supervisory behavior. As the manual is available to any employee and as this provision could reasonably be construed, *on its face*, as requiring employees to refrain from and/or report solicitations from union representatives, it is concluded that the continued maintenance of this policy constitutes a violation of Section 8(a)(1) of the Act, even though it obviously was not designed to affect the represented employees who are the subject matter in the present case. See *Headquarters Plaza Hotel*, 276 NLRB 925, 926–927 (1985); *McGaw of Puerto Rico, Inc*., 322 NLRB 438, 446 (1996); and *D&W Food Centers Inc*., 305 NLRB 553, 555–556 (1991). (This provision of the manual could also be construed by employees who read it as meaning that employee union activities will be placed under surveillance.)

C. Alleged Modifications of the Contract

1. "Pay Plus." bonus or wage increase?

During the period from 1984 to 1996, the Hospital had a variety of different programs designed to compensate nonunit employees. During some years, there were merit increases and at other times there were across-the-board pay increases. Also, at various times there were various bonus programs where people were paid additional amounts that did not affect their basic wage rates. As these programs were announced by the Hospital when they went into affect, the represented employees, no doubt were somewhat familiar with these programs even though they were not affected by them; their wages being determined by collective bargaining.

The 1994 to 1996 contract at schedule B states that certain payments were to be given over the life of the agreement. These were $450 following ratification; $450 on August 1, 1994; $340 on February 1, 1995; and $340 on July 1, 1995. It is not clear to me whether these payments, which were described in the contract as "lump-sum payments" were in lieu of wage rate increases or were in addition to increases.

During the negotiations that took place in December 1995 and January 1996, the hospital's original position was that it would not agree to give pay increases but rather would agree to give them lump-sum payments in lieu of wage increases. This proposal was based on the idea that granting lump-sum payments in lieu of wage increases would not cause a rise in other benefits that were based on the wage rates. The Union opposed this idea and demanded wage increases.

McNally, at one point, offered a 10-cent-per-hour wage increase during the first year of a contract, an increase of 5-cent-per-hour during the second year and some "structured" lump-sum payments. This also was rejected by the Union.

On January 11, 1996, McNally offered a 20-cent-per-hour wage increase during the first year plus the commitment to pay to the unit employees whatever bonus program was given to the nonunion employees. The Union countered with a proposal for a 3-year contract and indicated that they would accept the company proposal for years 1 and 2, and would accept a freeze for year 3 if the Company would drop its demand to eliminate the union-security clause. McNally finally agreed to offer a 20-cent-per-hour wage increase of the first year of the contract plus a lump-sum payment of $650, 3 months after ratification, plus a guarantee that the employees would receive, in the second and third years of the contract, the same bonus program offered to all other employees. For better or worse, the phrase lump-sum payments was used interchangeably with the term bonus and the contract, which at schedule A sets the new rates, contains the following language at schedule B;

> Schedule B.
>
> 3 months after ratification—$650
>
> 1997. Same bonus program for which nonbargaining unit will be eligible.
>
> 1998. Same bonus program for which nonbargaining unit will be eligible.

There is no dispute that when the Union's representative asked McNally, at the January 11 meeting, if the unit employees would be eligible for the same pay increases given to nonunion employees, the company's response was no; that the guarantee applied only to any annual *bonuses* paid to other employees.

At or about the same time that the Company was negotiating with the Union, it was also developing a pay and bonus plan for its other 3000 employees. This resulted in what was called the team plus/pay plus program that was announced to employees on January 31, 1996. This was before the union contract was executed which was on May 7, 1996.

In any event, the program for the nonunit employees provided for a two part package: (a) the team plus program which

was designed as a bonus program, the amounts determined by among other things, the hospital's profits; and (b) the pay plus program which was designed, for the most part, to increase the wage rates given to nonunion employees.

In year one of the collective-bargaining agreement, the unit employees got the wage increase that was called for (i.e., 20 cents per hour plus the $650 lump sum payment). In the second and third year of the contract, the unit employees got the same team plus bonuses that were given to all other employees. They did not get, however, any of the pay plus increases which the employer construed as being outside the term "bonus" and therefore not included in the collective-bargaining agreement.

The reason that the Union asserts that it was entitled, under its contract, to certain pay plus payments is because under the Pay Plus program some, but not all of the payments, were in the nature of lump sum payments to employees and not increases in their hourly wage rates. This requires a little explanation.

The pay plus program which was implemented in 1996 involved various levels of increases in the wage rates of all nonunion employees within each classification's wage range. As set up, the plan tended to be weighted in favor of people at the lower end of each wage range. However, for some people within some classifications, who were near or at the top of the pay classification's range, the pay plus program contemplated giving them a lesser percentage amount of money without changing the upper limit of the pay scale. Thus, if an employee in classification A was at the top of his or her pay range, that person would receive a lump sum amount, for example in the amount of 2.5 percent, in lieu of a wage increase. On the other hand, another employee within the same classification who was at the bottom of the pay range might receive a 6 percent increase in his or her hourly rate. (Each wage range was divided into fifths.) It is pretty obvious to me that the pay plus program was planned and implemented as a wage increase program and not as a bonus plan. To the extent that some employees would receive a lump sum payment instead of wage increases, this was a function of the employer's desire to retain a maximum rate within each classification while at the same time allowing employees at the top of the pay range to participate, at least to some extent, in the wage increases given to others within the same classification.

In the announcement of the new pay program on January 31, 1996, the Company, at that portion describing the Pay Plus portion, stated: "Every eligible employee will get a salary payment (either a raise or a second bonus) based on a new system designed to make salaries more fair and equitable."

Given the fact that the January 31 announcement described the pay plus program as giving employees either a raise or "second bonus" and also given the fact that some portion of the employees would get "lump sum payments" instead of wage increases, the Union expressed its opinion that these constituted a "bonus" to which its members should be entitled to in 1997 and 1998 under the terms of the collective-bargaining agreement. McNally refused, indicating that he interpreted the contract as requiring the company only to give whatever bonuses were given to nonunit employees; these being sole payments through the Team Plus program.

2. Shift differentials

For all employees the Hospital provides shift differentials whereby people working on evening and night shifts are paid more than what they would earn during a daytime shift. The nonunion employees are covered by the Hospital's Human Resource Policy and Procedure Manual and the bargaining unit employees are covered by their collective-bargaining agreement. For some time before 1996, the nonunion employees' shift differentials were greater than those for the unionized employees. (The shift differential for the bargaining unit employees was 85 cents per hour and according to Mr. Shoemaker was paid when employees worked 3-1/2 or 4 hours before or after regular shift.)

At the commencement of negotiations, the Union asked that the shift differential be raised to $2 per hour; that figure being the amount of the differential for nonunion employees working on the third shift.

Ultimately the parties agreed to the following language at Article VI, Section 3:

> *Shift Differential*. Employees shall be paid a shift differential of $.90 per hour in accordance with the Hospital's Human Resources Policy 3.7 *Shift Differential.*

Since the contract language provides for an amount which was different from the amount given to nonunit employees, the incorporation of human resources policy 3.7 can only refer to the eligibility requirements for obtaining the differential. That is, under what circumstances, an employee would be paid the difference.

McNally testified that when the above language was discussed, he told the Union's representatives that the hospital reserved the right to make changes in section 3.7 in accordance with section 1.1 of the Human Resources Policy Manual. The Union's representatives do not recall any such reservation and there is nothing in writing to memorialize it.

On April 11, 1997, the employees were told that the shift differential policy was being revised effective April 13, 1997. The changes involved modifications of the eligibility rules which had the affect of reducing the ability of employees to obtain the shift differential in certain situations. (All parties agreed that the changes were made and that they had an impact on the bargaining unit employees.)

William Finch, the interim union president told Tony Lemisch that the Union objected to the proposed changes insofar as they affected the bargaining unit employees. On April 15, 1997, the Union sent a letter protesting the change. The letter read:

> Local 1990 would like to inform you that we do not recognize the revision of Human Resource Policy 3.7 for the collective bargaining unit. We do not argue your right to change this policy for the non-bargaining unit of U.H.S. Hospitals.
>
> We have been advised by the International Brotherhood of Painters & Allied Trades that should U.H.S. Hospitals take unilateral action by changing a mandatory bargaining subject of wages (which includes shift differential and the eligibility to achieve it), our collective Bargaining Unit Agreement, it would constitute a violation of the National Labor Relations Act.
>
> We urge U.H.S. Hospitals to take a closer look at this policy change for the collective bargaining until to prevent an unfair labor practice charge being filed with the National Labor Relations board.

On April 16, 1997, the Union's representatives met with McNally and Lemisch. At this meeting, McNally asserted that the employer had the right to change section 3.7, inasmuch as by incorporating that provision into the collective-bargaining

agreement, the Union agreed, in effect, to the employer's right to modify it pursuant to section 1.1 of the Human Resources Policy Manual. That is, as section 3.7 was subject to modification, by agreeing to incorporate that section into the contract, the parties, a fortiori, recognized the possibility that it might be altered by the employer during the life of the agreement. The Union's representatives took the position that under the finality clause of the contract, the company could not change section 3.7 insofar as it affected unit employees because the contract incorporated the provisions of section 3.7 as they existed at the time of the contract's execution. The Union demanded that the hospital retain the old terms of the old section 3.7 for the life of the contract. Alternatively the Union proposed that they would agree to the new section 3.7 if the hospital raised the differential pay for the unit employees to match the amount paid to nonunion employees. McNally refused. The Union's representatives stated that they would be forced to file an unfair labor practice charge and McNally stated that if it was illegal to make changes in section 3.7, it would also be illegal for the hospital to have made the changes in the paid time off carryover and the Family Leave Act provisions of the Human Resources Policy 4.1 which had previously been incorporated by reference into the collective-bargaining agreement at article 7, section 6. McNally stated that if the Union filed the unfair labor practice charge regarding the change in section 3.7, he would have to consider withdrawing the "favorable" changes made to section 4.1 which had been put into affect vis a vis all employees including unit employees. As the changes to section 4.1 were not particularly impressive, the Union's representatives indicated that they were not sufficiently significant to induce them to refrain from pushing for the status quo regarding the shift differential policy.

3. Legal discussion regarding alleged contract changes

It seems to me that what we have here involves a matter of contract interpretation, where the resolution requires an interpretation of the language used in the contract in light of the objectively manifested intent of the parties when they made the contract. In one instance the issue being, what was the meaning of the word "bonus" as it was used in schedule B of the 1996–1999 collective-bargaining agreement. In the second instance, the issue is whether, by incorporating section 3.7 of the Hospital's Human Resource Policy into the union contract (dealing with differential pay), the parties agreed that the Respondent therefore had the right to make changes in that policy, pursuant to section 1.1 of its Human Resource Policy Manual.

The next question is whether this is the type of issue that should be decided by the Board, especially as the parties to the contract have established a grievance/arbitration procedure to resolve matters of contract interpretation and enforcement.

Section 8(d) of the Act provides, inter alia, that neither party to a collective-bargaining agreement may terminate or modify such contract during its term. The effect of Section 8(d) is that in order for a change or modification to be made in an existing contract, the *consent* of both parties is necessary.[1] In the present case, it is the General Counsel's theory that the Respondent unilaterally modified specific provisions of the 1996–1999 contract without the Union's consent.

In my opinion, the disputes between the parties regarding the bonuses and the differential pay are essentially disputes concerning the interpretation of the collective-bargaining agreement. While the Union may have a reasonable basis for its interpretation of the respective contract clauses, the employer's interpretations of the clauses are, in my opinion, also plausible. The evidence in the present case shows that the relationship between the employer and the Union has been amicable and businesslike; there being no evidence of animus, bad faith or intention to undermine the Union. The contract provides a grievance/arbitration procedure to resolve disputes regarding contract interpretation and the disputes involved in the present case surely could have been resolved in that forum. Accordingly, I shall recommend that these allegations of the complaint be dismissed. *Westinghouse Electric Corp*., 313 NLRB 452 (1993); *Crest Litho*, 308 NLRB 108, 110 (1992); *Atwood & Morrill Co*., 289 NLRB 794, 795 (1988); *NCR Corp*., 271 NLRB 1212, (1984).[2] See however, *Carrier Corp.*, 319 NLRB 184, 196 (1995), where the administrative law judge found that the employer's interpretation of the contract was implausible.

Notwithstanding the above, I conclude that the Respondent, on April 16, 1998, violated the Act when McNally told union representatives, (who also were employees), that if they filed an unfair labor practice charge over the differential pay issue, he would consider rescinding certain other changes that the hospital made regarding section 4.1 of the policy manual, which favored the bargaining unit employees. McNally may have intended these remarks merely to illustrate his argument that the contract gave the employer the right to modify human resources policies which are incorporated by reference into the union contract and that if a change in one was a violation of law, then any other changes made in similar policies incorporated by reference, would also be a violation of the law. That may have been his intention, but a reasonable person hearing his remarks might have reasonably construed them as going beyond an argument and amounting to a threat to withdraw benefits previously granted in the event that the Union filed an unfair labor practice charge. Therefore to this extent, I conclude that the Respondent violated Section 8(a)(1) of the Act.

D. Alleged Refusal to Furnish Timecards

Karen Hadaway became the secretary in the engineering department in 1994 and part of her responsibility was to gather the timecards and transmit the information to payroll. Her duties included ascertaining what appropriate rates of pay were applicable when the employees worked overtime or were on call or when they worked in circumstances where shift differentials were required. When employees had questions about their pay, they typically would go to her and review their paychecks with the timecards at the time that they received their pay.

McNally testified that when Hadaway started in the engineering department, she more effectively then her predecessor, applied the appropriate contract rates to the employees there. This apparently, caused some disputes, especially during the

[1] This is unlike the more typical unilateral change case where the employer changes a term or condition of employment that is not specifically defined by the collective-bargaining agreement. In such cases, the employer's obligation is to notify and bargain with the Union. If an impasse is reached after good-faith bargaining, the employer may make the proposed change. *NLRB v. Katz*, 369 U.S. 736 (1962).

[2] The fact that the Respondent has not urged in the present case that the matter be deferred to arbitration pursuant to *Collyer Insulated Wire*, 193 NLRB 837 (1971), is not relevant. In the circumstances of this case, it is not the Respondent's obligation to initiate the arbitration provisions of the contract, which at this point would be untimely. *NCR Corp*., supra at fn. 7.

winter months when the various pay policies would come into play. As the contract's provisions for overtime, on-call pay, and shift differentials might all come into play during a winter storm (for which Binghamton and Johnson City are noted) this was fertile ground for confusion and contention.

As early as December 1995 the Union began making requests that the hospital do audits of its timecard and payroll records for extensive periods of time. The company's response was that it was not going to do this. For example, in a letter dated December 7, 1995, from McNally to Shoemaker, he stated:

> In the past whenever there have been individual concerns regarding a specific payroll we have researched the matter. When it was appropriate we have made adjustments. This has been our practice and we will continue to research individual and specific concerns in the future.
>
> In your letter of December 6, you have not identified any specific concerns with individuals' paychecks. Departmental wide review of all payroll records for the Engineering Department to identify "possible mispayments" is neither practical nor reasonable and we are not prepared to go forward with this request. However, if any employee has a specific concern we will be glad to research that matter. [3]

On June 25, 1996, Union Representative Walter Sawicki wrote to Tony Lemisch regarding alleged payroll errors. He stated:

> We are making a second request for such a meeting, and at that time we would like to see verification of the information that you have that no payroll errors were made. Such verification should be made utilizing payroll sheets and time cards for November through March of each year beginning with the year 1980 when new wording was applied to the collective Bargaining Agreement, Section 2, Article A, Page 8. This wording was in effect until January 1996 when new wording was again added.

This memorandum was passed from Lemisch to manager Roger Brown who wrote on the document; "I think you know my feeling on this. There is no way we are going back 16 years in some witch hunt."

On April 1, 1997, the Union sent another memorandum to McNally stating, in pertinent part;

> Mr. McNally, Local 1990 would like to request a meeting to be scheduled concerning the persistent payroll mistakes in the Wilson Engineering Department. This concern was brought to your attention March 4, 1997, in a grievance response meeting. However, you felt it did not pertain to the issue at hand and suggested a separate meeting to be scheduled.
>
> We have since tried to correct this problem through our manager of the Engineering Department but the results have been unsuccessful. Local 1990 now feels a meeting with your involvement is imperative to help correct this situation . . . .

Mr. McNally's response was:

> Thank you for your recent correspondence relative to alleged payroll mistakes. . . . My understanding from Tony Lemisch is that the actual number of errors is quite low. In addition I am advised that several of the acknowledged discrepancies were in favor of the employees which indicates to me that this matter is not all that serious. To address your request about finding a solution, I would suggest that you work closely in the future with Tony and Karen to minimize miscommunication and to improve the accuracy of the data submitted on the time cards.

Thus, from at least 1996, the employees have raised questions regarding the application of the appropriate rates of pay, particularly during the winter months. In representing the employees, the Union's representatives instructed employees to make copies of their own timecards and also made several requests on the company, *in writing*, that the Hospital do an extensive audit. The company has consistently refused these audit requests and there is no contention, in this case, that such refusals constitute a violation of the Act.

Michael Shoemaker testified that at some time in later 1996 or early 1997, various employees had questions about their pay and that he and Walter Sawicki brought to the attention of Ms. Hadaway that many employees were complaining that they were not being paid properly. He then testified that he "believed" at that time, that "we requested some timecards, and she said that we were not able to access the timecards at that time." In relation to this testimony, Mr. Shoemaker could not recall when these requests were made or for which employees the requested timecards were made. Unlike the Union's normal practice of putting such matters in memoranda or letters, these alleged timecard requests were not put in writing.

William Finch, testified that he took over Shoemaker's role as union president when Shoemaker was out on disability from October 1996 to March 1997. Finch also testified that he made many verbal requests to Karen Hadaway and Tony Lemisch for timecards and that they refused. When pressed as to whose timecards he sought, Mr. Finch recalled that he made verbal requests for the timecards of employees Terry Rundell and Jim McManus regarding questions they had on shift differentials. He could not recall, however, when such requests were made and therefore, it is impossible to ascertain whether any verbal requests and denials were within the 10(b) statute of limitations period.

Apart from a written request for his own timecards, made around January 24, 1997, none of the other alleged timecard requests were made in writing. Finch's written request stated:

> I, William Finch . . . request to see my time cards for the pay period of 2/4/96 to 2/17/96, 3/3/96 to 3/16/96 and 12/8/96 to 12/21/96 regarding the possibility of missed payment of shift-differential per Local 1990's contract starting February 1st 1996 to present.

On January 28, 1997, Mr. Lemisch wrote to Mr. Finch and stated;

> In response to your recent request, which was presented to me by Walter Sawicki on 1/24/97 to see your timecards for the pay periods of 2/4/96 – 2/17/96, 3/3/96 -

[3] Similar requests were made by individual employees. In April 1996, employee James McManus requested an audit of his time going back to 1994 and if discrepancies were found, an audit for the past 5 years. Another employee, Christopher Allen, also made a request for a review of his time cards dating back to 1989. These requests were refused.

> 3/16/96 and 12/8/96 – 12/21/96, as a courtesy your request will be honored for the most recent pay period requested. As your request is outside the timeframe designated in the contract (within 7 calendar days of the date of the incident . . . .), no further copies will be provided nor review performed.
>
> I have attached a copy of your 12/8/96–12/21/96 timecard.

With respect to Finch's written request for his own timecards, I note that under article X of the contract, a grievance regarding pay for any of these dates, with the possible exception of the last pay period, would be barred as the contract requires grievance to be filed within 7 days of an occurrence.

Both Hadaway and Lemisch credibly denied that they received any of the verbal requests for timecards that were mentioned by Shoemaker and Finch. This therefore, leaves for consideration the question as to whether the employer's refusal to furnish some of the timecards in response to Finch's written request, violated Section 8(a)(1) and (5) of the Act.

Where information is sought for the purpose of evaluating and processing a grievance, the legal test is whether the information is relevant to the grievance. And in this respect, the determination of relevancy is made based on a liberal, discovery type of standard. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); and *Knappton Maritime Corp.*, 292 NLRB 236 (1988). Moreover, the fact that the information sought may tend to disprove a grievance is as equally relevant as those situations where the information would tend to support a grievance. This is because the process of resolving grievances is best served by the disclosure of information which will tend to resolve grievances one way or the other, at the earliest stage of the procedure and not burden the parties with unwarranted arbitrations. *NLRB v. Acme Industrial Co.*, supra; *Square D Electric Co.*, 266 NLRB 795, 797 (1983); and *Ohio Power Co.,* 216 NLRB 987, 991 (1975).

In *W. L. Molding Co*. 272 NLRB 1239 (1984), the Board concluded that the employer had violated the act by failing to honor a union's request for information regarding subcontracting and transferring of unit work. The Board, although not passing on the merits of the Union's grievance claim, stated:

> As the judge noted, a broad discovery-type standard is applicable to requests for information relevant to a union's functions of negotiating and policing compliance with a collective-bargaining agreement . . . . "[I]t is not the Board's function in this type case to pass on the merits of the Union's claim that Respondent breached the collective bargaining agreement or . . . . committed an unfair labor practice." . . . . Thus, the union need not demonstrate actual instances of contractual violations before the employer must supply information. . . . . "Nor must the bargaining agent show that the information which triggered its request is accurate, nonhearsay, or even ultimately reliable. The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." [Citations omitted.]

If the information requested by Union Representative Finch was relevant to a grievance filed or even to evaluate whether a grievance could be filed, the employer's refusal to furnish timecards would constitute a violation of the Act. Nevertheless, Finch's request for his timecards, for the purpose of determining whether a shift differential was improperly withheld from him, went back to a period which was outside the "limitation" period of the grievance/arbitration provisions of the collective-bargaining agreement. (As noted above, a grievance must be filed within 7 days of the occurrence giving rise to the grievance.) Therefore, the Union could not have filed a grievance for such periods, no matter what the time cards showed. And to the extent that a grievance might have been timely filed regarding the pay period from 12/8/96 to 12/21/96, the timcards for that period were turned over.

In sum, I therefore conclude that the Respondent has not violated the Act by refusing to turn over information which is relevant to the enforcement of the collective-bargaining agreement.

CONCLUSIONS OF LAW

1. By maintaining in force and effect a rule requiring employees to refrain from talking to union representatives and requiring them to report any conversations with union representatives to management, the Respondent violated Section 8(a)(1) of the Act.

2. By telling employees that if the Union filed an unfair labor practice charge, the employer would withdraw certain benefits previously given to employee, the Respondent violated Section 8(a)(1) of the Act.[4]

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

4. The Respondent has not violated the Act in any other manner encompassed by the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

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[4] Although I have concluded that the Employer threatened to withdraw certain benefits, the evidence does not indicate that this threat was ever carried out.